IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.679 OF 2005
IN
CRIMINAL CASE NO. 1627/S/2002
IN
CRIMINAL CASE MISC. /269/2000

Dr.M.B.Rawate ..Petitioner

Vs.

The State of Maharashtra
and Ors. ..Respondents

...

Petitioner in person present
Mrs.A.S.Pai A.P.P. for the State
Respondent no.2-Shri.Shankar Rao Yesare
in person

...

CORAM: SMT.V.K.TAHILRAMANI,J.
DATE : DECEMBER 5, 2007

P.C.

1. Heard the petitioner in person, the learned A.P.P. for the State and the Respondent no.2 who is present in person.

2. The petitioner-original complainant had filed complaint against Respondent No.2 being Criminal Misc. Case No. 269 of 2000. The said complaint is under Sections 213, 217, 218, 219, 120-B r.w.

109 and 34 r.w. 114 of the IPC. In the said case, the process came to be issued by the learned Magistrate under Sections 213, 217 and 218 of IPC. Thereafter, respondent no.2 preferred application before the learned Magistrate for recall of process. By order dated 5.4.2004 the learned Magistrate recalled the process. Being aggrieved by this order, the present petition has been preferred.

3. The petitioner has submitted that in view of the decision of the Supreme Court by a Bench of three Judges in the case of **Adalat Prasad V. Rooplal Jindal, 2004(2) Bom.C.R. (Cri.) (S.C.) 857: 2004(4) Mh.L.J. 274**, the Magistrate has no power to recall the process. He further submitted that in view of the said decision, the Magistrate has no powers to review his orders and in such case, the process issued by the Magistrate, could not have been recalled by the learned Magistrate and the remedy open to the accused was that he should have approached the higher forum.

4. No doubt, in the case of **Adalat Prasad (supra)**, it has been held by the Supreme Court that

Magistrate cannot review his order and thus cannot recall the process issued by him. However, it is seen that decision in the case of **Adalat Prasad** is dated 25th August, 2004 whereas, in the present case, the learned Magistrate has recalled the process by order dated 5th April, 2004. At the time when the learned Magistrate recalled the process, the decision in the case of **Adalat Prasad** was not in the field. At that time, the decision which was being followed, was the decision in the case of **K.M.Mathew Vs. State of Kerala, (1992) 1 S.C.C. 217.** In the said decision, the Supreme Court has held that the "Magistrate can recall the process". In this view of the matter, no fault can be found with the order of the learned Magistrate for entertaining the application for recall of process preferred by the accused and in deciding the same.

5. It is an admitted fact that till today, no sanction has been issued in the said case. The main ground for recalling the process was that at the time when process was issued, no sanction had yet been granted. The petitioner has submitted that as the complaint against the respondent

no.2-accused was for wilful disobedience of direction of law which is not part of his duty, no sanction under section 197 is required. It is not in dispute that when the process came to be issued and came to be recalled, the accused/Respondent No.2 was in service as a police officer. In view of the fact that the respondent no.2 was a public servant and looking to the allegations made in the complaint, no fault can be found with the reasoning recorded by the learned Magistrate. Hence, no case is made out for interference with the impugned order.

6. Writ Petition is rejected.

[SMT.V.K.TAHILRAMANI,J.]